

Environmental and Utilities Update

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EPA Adopts Final Rules for First-Ever Nationwide Greenhouse Gas Reporting

On September 22, 2009, U.S. Environmental Protection Agency (EPA) Administrator Lisa Jackson signed a much-anticipated final regulation, originally proposed this past March, that requires certain large emitters of greenhouse gases (GHG) to monitor and report their GHG emissions to EPA. The regulation is the first broad-application federal regulation of GHGs. While much of the March proposal was adopted unchanged, there are some significant revisions.

Although the final rule is three months behind the June 2009 adoption deadline set by Congress, most covered entities are still required to begin monitoring GHG emissions as of January 1, 2010, with the first report due March 31, 2011. However, from January 1, 2010 through March 31, 2010, a covered source may use "best available monitoring methods" if it cannot purchase, install and operate required monitoring equipment by January 1, 2010. An extension of time beyond the March 31, 2010 deadline may be available under limited circumstances to covered sources who submit a timely request.

What GHGs Must Be Reported?

As in the proposed rule, the final rule requires reporting of several kinds of GHGs: carbon dioxide (CO₂), methane, nitrous oxide, sulfur hexafluoride, hydrofluorocarbons (HFCs), perfluorochemicals (PFCs), and other fluorinated gases. In a few instances, the final rule exempts specific sources from reporting certain GHGs (e.g., methane and nitrous oxide from aircraft engines).

Who Must Report?

The rule requires annual reporting by approximately 36 source categories. These include certain "upstream" sources (meaning suppliers of certain fossil fuels and gases) and "downstream" sources, including specific industrial facilities and other direct GHG emitters of at least 25,000 metric tons of carbon dioxide equivalent (mtCO₂e) per year. (CO₂e is a measurement by which non-CO₂ GHGs are equalized to CO₂ on the basis of relative global warming potential.) Entities such as large fossil-fueled electricity generators who are already reporting GHG emissions under the Clean Air Act's Acid Rain Program on a quarterly basis will continue to do so.

Annual reporting is also required for motor vehicle and engine manufacturers outside of the light-duty vehicle sector, who must report GHG emission rates for their products.

A direct emitter must determine whether its emissions equal or exceed the emission threshold by aggregating emissions from all regulated source categories (as specified in the final rule) located within the physical boundary of its facility. Fossil fuel and gas suppliers must report based on imports, exports, and total production. Engine manufacturers subject to the rule must report by engine type.

While most emitters are required to begin monitoring emission in 2010, with reports due by

March 31, 2011, motor vehicle and engine manufacturers will not have to report until 2012 for model year 2011, with later reporting years for certain gases emitted by certain engine types.

Basic Structure of the Final Rule Is Unchanged

Like the proposed rule, the final rule requires reporting on a facility basis rather than a corporate basis (with the exceptions being upstream emitters and engine manufacturers). Also like the proposed rule, the final rule is organized around source categories based on industrial sectors (*e.g.*, pulp and paper production), or defined types of emission units that typically emit GHG (*e.g.*, a stationary combustion unit that burns fossil fuels to produce electricity, steam or useful heat). Facilities in certain source categories are subject to reporting regardless of emission levels. By contrast, facilities with one or more stationary fuel combustion units are subject only if the units collectively emit at least 25,000 mtCO_{2e} per year. A facility that has stationary fuel combustion units with an aggregate maximum rated heat input capacity of less than 30 million British Thermal Units (MMBTU) per hour may presume that its emissions are below the 25,000 mtCO_{2e} per year threshold.

Each source category must comply with category-specific methodologies and requirements regarding emission calculations, monitoring and quality assurance, missing data, recordkeeping, and reporting. If a particular facility includes operations falling into multiple source categories, it must follow the requirements for each source category. For instance, a pulp and paper mill with on-site stationary combustion units must report emissions covered by the pulp and paper manufacturing category as well as the stationary fuel combustion category.

Key Changes from the March 2009 Proposed Rule

Some of the more significant revisions that EPA made to the final rule include the following:

- Several source categories included in the proposed rule are not subject to the final rule. EPA states that it is still evaluating public comments received regarding these categories. These source categories are electronics manufacturing, food processing, industrial landfills, wastewater treatment systems, ethanol production, fluorinated GHG productions, magnesium production, oil and natural gas systems, sulfur hexafluoride from electrical equipment, underground coal mines, and coal suppliers.
- The final rule expands a proposed exemption for research and development from the aluminum and glass production categories to all research and development activities except pilot plants. However, any research and development process unit that has stationary fuel combustion units with a combined total GHG emissions of at least 25,000 mtCO_{2e} per year must report those emissions.
- Exemptions have been added for combustion sources such as flares, emergency engines and emergency equipment, as well as for sources that burn certain unconventional fuels or that burn hazardous waste under certain conditions.
- Unlike the proposed rule, the applicability of the final rule is not based on "once in, always in." Reporting will no longer be required for a facility or supplier that reports less than 25,000 mtCO_{2e} for five consecutive years or less than 15,000 mtCO_{2e} for three consecutive years or that discontinues its GHG emitting process.
- In response to comments expressing confusion regarding the use of Continuous Emissions Monitoring Systems (CEMS) to measure GHG emissions, EPA has revised some portions of the final rule to ensure consistency and to clarify when CEMS should be used, as well as to clarify under what circumstances CEMS equipment upgrades are required. EPA also added CEMS calibration specifications and procedures for calculating calibration errors.
- EPA revised source category requirements to specify that where process emissions subject to CEMS requirements are comingled with combustion unit emissions in the same stack, the facility must report GHG using both the CEMS and a stipulated methodology to calculate comingled emissions.

- Reporting is not required for light-duty vehicles. EPA and the Department of Transportation are addressing these emissions through a separate September 15, 2009 proposal to set GHG "tailpipe" standards and corporate fuel economy standards.

What's Next?

The final rule, located at 40 C.F.R. Part 98 and currently available on EPA's website, should be reviewed carefully to assess applicability, details of monitoring and reporting requirements, and changes from the proposed rule. Subject facilities should determine whether and what steps may need to be taken to enable compliance as of the January 1, 2010 effective date.

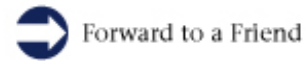
Robinson & Cole is currently advising a number of clients regarding the final rule, as well as the challenges and opportunities from emerging climate change programs at federal, regional, state and local levels. We stand ready to apply our experience and insights to your operations and strategic planning, particularly in these challenging economic times. If you would like to discuss how these issues may impact your business, please contact any of these attorneys in our Environmental and Utilities Practice Group:

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